FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON 25, D. C.

AUG 25 1961

IN REPLY REFER TO:

Honorable Phillip S. Hughes
Assistant Director for
Legislative Reference
Executive Office of the President
Bureau of the Budget
Washington 25, D. C.

Dear Mr. Hughes:

In accordance with Budget Circular A-19, revised June 16, 1960, we are submitting the Commission's views with respect to enrolled bill S. 2034 of the 87th Congress, an act to amend the Communications Act of 1934, as amended, in order to expedite and improve the administrative process by authorizing the Federal Communications Commission to delegate functions in adjudicatory cases, repealing the review staff provisions, and revising related provisions.

As you know, S. 2034 is an outgrowth of recommendations made by the President in Reorganization Plan No. 2, transmitted to the Congress on April 27, 1961, and disapproved by the House on June 15, 1961. As shown by their remarks in the course of the Congressional debate, the principal Congressional sponsors of the bill, Senator John O. Pastore, Chairman of the Subcommittee on Communications of the Senate Commerce Committee, and Representative Oren Harris, Chairman of the House Committee on Interstate and Foreign Commerce, were of the opinion that this legislation will accomplish substantially all of the important aims of Reorganization Plan No. 2. (107 Cong. Rec. 12715, Senate Debates; 107 Cong. Rec. 13550, House Debates). The Commission agrees that this legislation will constitute a major step toward accomplishing those aims. Moreover, we note that this bill is substantially the same as the legislation unanimously recommended by the Commission after Reorganization Plan No. 2 was disapproved.

The Commission strongly recommends that the President sign this bill. Enactment of this legislation will bring about much-needed administrative improvements within the Federal Communications Commission. It will enable the Commission to speed up its adjudicatory

proceedings without sacrificing any safeguards of due process. Further, it will go far toward giving the Commission that flexibility of control over its operations which is desirable under sound principles of public administration, but which, unfortunately, is now impossible under the present requirements of the Communications Act. Thus, the Commission will be able better to concentrate its time and efforts on important matters of policy instead of on the many routine matters which it is now required to consider in detail.

For convenient reference there is attached a section-by-section analysis of the bill which sets forth the Commission's views with respect to its important features.

At the present time we are unable to arrive at any meaningful estimate of the costs or savings which would result from enactment of this legislation. On the whole, however, it would appear that to the extent that the new provisions reduce or eliminate wasteful and unnecessary procedures, and permit a more efficient utilization of personnel, they will ultimately bring about savings in operating costs, which should, of course, be recurring.

In view of the foregoing considerations, we most strongly recommend that S. 2034 be signed into law.

Sincerely yours,

R. T. Bartley

Robert T. Bartley
Acting Chairman

Enclosure

Analysis by the Federal Communications Commission of Enrolled Bill, S. 2034, 87th Congress, 1st Session

Section 1

Section 1 would repeal the provisions of section 5(c) of the Communications Act, relating to the review staff. Under these provisions, the review staff, even though it can have no other functions than to assist the Commission in adjudicatory cases, is nevertheless precluded from making any recommendations to the Commission. In our view, the artificial barriers of section 5(c) are both wasteful and inefficient, since they deprive the Commission of the full assistance of which the review staff is capable, and require the two-step procedure of instructions and a draft order even as to the most routine interlocutory matters.

The repeal of these unduly restrictive provisions will, in our opinion, prove highly beneficial. Such repeal will contribute substantially to speedier action, without sacrificing in any way the rights of parties, given the continuing safeguards of section 409(c) of the Communications Act and section 5(c) of the Administrative Procedure Act. In addition, it will permit more efficient use than is now possible of personnel presently engaged in review functions.

Section 2

Section 2 is one of the most important sections of this bill. Its broad purpose is to amend section 5(d) of the Communications Act so as to permit the Commission to delegate any of its functions, including those in adjudicatory cases, to a panel of Commissioners, an individual Commissioner, an employee board, or individual employee, subject to the various safeguards discussed below.

The Commission strongly favors this amendment, because through it, the Commission will obtain much needed authority, now withheld under present section 5(d)(1), to employ panels of Commissioners or employee boards to pass on adjudicatory cases. Under present procedure, it is necessary for the full Commission to pass on exceptions in every adjudicatory case, including those involving fishing boat license suspensions or the most routine aural broadcast matters. By being required to pass on such cases, no matter how trivial, the Commission is deprived of valuable time which could be used to better advantage on other more important matters. Amended section 5(d), by empowering the Commission to decide which matters are of sufficient importance to warrant the attention of the full Commission, would end the dissipation of administrative energies on routine cases which can equally well be decided by less than the whole Commission. Thus, under the new authority, the Commission will be able to concentrate on important cases involving major policy or legal issues, and the

disposition of all adjudicatory cases should be substantially expedited.

The Commission's power to delegate its functions would not be unlimited, for, as noted at the outset, that power is subject to certain restrictions. Under the terms of the amended statute, any rule or order pursuant to which authority is delegated could be adopted, amended, or rescinded only by a vote of a majority of the members of the Commission then holding office. Moreover, by virtue of the exception contained in amended section 5(d)(1), the basic power to determine which functions should be delegated is non-delegable. Similarly, that same exception provides that the functions granted to the Commission by new subsections 5(d)(4), (5), and (6) are also non-delegable. These subsections pertain to the right of one who has been aggrieved by any action taken under delegated authority to apply to the full Commission for review. However, such review by the full Commission would be discretionary, and the Commission could deny applications for review without setting out its reasons for such action (subsection 5(d)(5)). The latter are extremely important features which would eliminate much of the burden of deciding applications for review.

A final limitation on the power to delegate contained in subsection 5(d)(1) is that adjudicatory hearings could be conducted only by one of the three authorities specified in section 7(a) of the Administrative Procedure Act, i.e., "... (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this [the Administrative Procedure] Act".

Under other provisions of amended section 5(d), the Commission would have full authority to review on its own motion any action taken pursuant to delegated authority; action taken pursuant to delegated authority would have the same force as other action; an application for review could not rely on questions of fact or law upon which the delegated authority had not been afforded an opportunity to pass; and the filing of an application for review is made a condition precedent to judicial review of delegated action. In this way, the case will be presented to the Commission (and if the application is denied, to the courts) with a ruling on every issue, and the Commission will have an opportunity to review the decision before the matter goes before the courts. Additionally, the statutory language (subsection 5(d)(2)) makes clear that the application for review procedure is inapplicable to the initial decision in adjudicatory cases; such decisions are to be reviewed solely by the filing of exceptions, as provided in section 409(b) of the Communications Act.

Another provision of amended section 5(d) is contained in subparagraph (8) thereof. This subsection concerns the duties and qualifications of the employees to whom the Commission delegates review functions in any case of adjudication.

Section 3

Section 3 would revise section 405 of the Communications Act, relating to petitions for rehearing, to reflect the provisions of amended section 5(d). As revised, section 405 would permit an aggrieved party to file a petition for rehearing only to the authority making the decision, that is, to the Commission, if it made the decision, or to the designated authority under new section 5(d)(1), if it issued the decision. No change in substance is intended by these conforming changes.

Section 4

Section 4 makes extensive revisions in section 409 of the Communications Act, which contains general provisions relating to adjudicatory proceedings. These changes will go far toward eliminating the present stringent "separation" requirements of present section 409, which experience has proven to be unduly burdensome and productive of unnecessary delay. These changes will also permit the Commission to operate under substantially the same procedural requirements in adjudicatory cases as those which now govern other agencies who operate under the requirements of the Administrative Procedure Act.

The changes in law which would be effected by the amendments to section 409 can be summarized as follows. First, the restriction in present subsection 409(a) that hearings shall be conducted only by the Commission or one or more examiners is dropped. Thus, one or more Commissioners may conduct the hearing, a procedure consistent both with the amended provisions of section 5(d)(1), supra, and the present language of section 7(a) of the Administrative Procedure Act.

Second, while subsection 409(b) would retain the present right of a party to file exceptions to an initial decision, which must be passed upon by the Commission or designated authority within the Commission (e.g., panel of Commissioners or employee board), the right of oral argument on exceptions would become discretionary rather than mandatory. This does not mean that oral argument will be no longer available, but rather that the Commission would have discretion to eliminate such argument in those instances where in its judgment it would serve no useful purpose. Every other major Federal regulatory agency presently has such discretion; clearly, the Commission should be given similar flexibility. What is more, this flexibility should be of material assistance in expediting the Commission's procedures.

Third, the provisions of subsection (c) of section 409 which bar ex parte presentations by persons who have participated in the presentation or preparation for presentation of an adjudicatory case

at the hearing or review stage would be retained. But the separation of functions provisions of present section 409(c) would in general be deleted, and the provisions of section 5(c) of the Administrative Procedure Act would become applicable to adjudicatory proceedings before the Commission, including proceedings to determine initial licenses. The amendment of section 409(c) would result in the following specific changes:

(i) The present provisions of section 409(c)(2) and (3) specifically prohibiting in adjudicatory cases the Commission from consulting with any member of the Offices of the General Counsel or of the Chief Engineer would be eliminated. Instead, the standard of section 5(c) of the Administrative Procedure Act would be applicable, pursuant to which only staff persons who had engaged in the performance of investigative or prosecuting functions in the case or a factually related one would be precluded from participating in the intra-Commission discussions leading to the issuance of the decision. The latter standard, being directed squarely to the fairness problem involved, is obviously the correct one. Virtually all the major administrative agencies have functioned well under it. There is thus every reason to permit the Commission to return to it. For it is clearly wasteful to cut off the Commission in an adjudicatory case from the valuable assistance of its chief legal and engineering officers, where these officers have had no investigative or prosecutory connection with the case (or a factually related one).

(ii) Under the present language of section 409(c)(1), Commission hearing examiners are precluded from consulting any other person (except another examiner participating in the conduct of the same hearing) on any fact or question of law in issue. As a result of this bill, Commission hearing officers would be subject to the more reasonable and appropriate standard of section 5(c) of the Administrative Procedure Act which now governs other agencies, and which only bars consultation concerning any fact in issue. Permitting consultation on legal and procedural questions should result in improving the quality of initial decisions and in expediting their preparation. (See Attorney General's Manual on the Administrative Procedure Act, pp. 54-55.)

Finally, subsection (d) provides that to the extent the foregoing provisions or those of the new section 5(c) conflict with the provisions of the Administrative Procedure Act, the latter are superseded.

Section 5

The final section of the bill is a "saving" provision with respect to pending proceedings. It merely states that all cases set for hearing by the Commission prior to the date of enactment shall continue to be governed by the second sentence of present section 409(b). This means that in such cases the Commission must hear oral argument on request of the parties.

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